LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 22 1962
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 389

MRS. AGNES JUNE DILLARD,

Petitioner

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,

Defendant,

~~Reply Brief of~~ **Petition For Writ of Certiorari to the Court of Appeals of Georgia**

G. SEALS AIKEN,
Attorney for Petitioner,
Suite 1409-10 Candler Bldg.,
Atlanta 3, Georgia

CHARLES W. BERGMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 389

MRS. AGNES JUNE DILLARD,
Petitioner

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.
Defendant

REPLY BRIEF OF PETITIONER FOR CERTIORARI

Now comes Mrs. Agnes June Dillard, Petitioner for Certiorari, and shows to the Court, in response to the reply brief of Respondent, the following:

Respondent's principal contention is that the constitutional question was not reasonably raised. Is it not clear from the facts and circumstances presented in the petition for certiorari that the constitutional question was reasonably raised? Does the exercise of prudence and reasonableness require anticipation that the State Court of Appeals would fail to adhere, as it did in this case, to the well recognized and bind-

ing prior decisions of that Court as well as the Supreme Court of Georgia as to the efficacy of judgments against a person or party (natural or artificial) using a fictitious or trade name? Must a party litigant assume that the State Appellate Court will evade application of such prior and binding decisions by holding the evidence presented a question of fact for the jury to determine, whereas the verdict was unsurported by any competent evidence and was contrary to the solemn admissions in judicio of the Respondent?

On page 8 of the appendix will be found the following statement by the Court of Appeals: "Boiled down, there was nothing more than a factual question to be resolved by the jury as to whether Jackson's Atlanta Ready Mix Concrete Company, Inc. did or did not have an assumed or trade name, and WHETHER IT WAS ONE AND THE SAME AS THE DEFENDANT IN FI. FA. THE EVIDENCE ON THAT ISSUE WAS IN CONFLICT, and the jury resolved it in favor of the claimant and against the plaintiff." (Emphasis supplied).

Was the evidence on the issue of identy in conflict? Nothing is or could be more at variance with the actual facts. Examples: 1. The introductory paragraph of one of the traverses reads: "Now comes Jackson's Atlanta Ready Mix Concrete Company, Inc., one of the defendants in said matter, and at the first term of said court after notice to him of service purporting to show him legally served in Fulton County, Georgia and traverses same***. This defendant was never legally served through any officer or agent as by law provided.***" On dismissal of said traverse by the same attorneys it was stipulated: "Jackson's Atlanta Ready Mix Concerete Company after levy made, HAVING FILED A THIRD PARTY CLAIM IN THE WITHIN MATTER,

the above traverse is hereby withdrawn and dismissed." (Capitals added). 2. In a proceeding to act aside and vacate petitioner's judgment (which was never withdrawn), Respondent Jackson's Atlanta Ready Mix Concrete Company, Inc. EXPRESSLY DESIGNATED ITSELF SEVEN TIMES AS THE DEFENDANT. (R.58). 3. The copy of the complaint and process served upon its employee, E. H. Lambert, was produced and in court on the trial of the claim case and by stipulation was admitted as having been served. (R.47-8 and 54). 4. Plaintiff's exhibit number 4, being page 271 of the Alphabetical Section of the Telephone Directory, showed the listing: "JACKSON READY MIX CONCRETE CO. INC. 1000 SEABD NE JA 5-2758". Another page of said directory shows "JACKSON'S READY MIX CONCRETE" on a picture of a cement mixing truck. These are but four examples of evidence in the record showing that the Respondent is the same entity or party as Jackson Ready Mix Concrete Co. Inc., the Defendant in Fi. Fa.

In STATE OF MISSOURI, EX REL. MISSOURI INSURANCE CO. V. GEHNER, ETC., 281 U.S. 313, 50 S. Ct. 326, this court held: *"it may not be reasonably held that the* (Insurance) *Company was bound to anticipate such a construction or in advance to invoke Federal protection against the taxation of its United States bonds.* Upon the facts disclosed by the record it is clear that appellant sufficiently raised in the highest court of the State the Federal questions here presented, and is entitled to have them considered." (Emphasis added)...

Very shortly thereafter, in BRINKERHOFF-FARIS TRUST & SAVINGS CO. V. HILL, ETC., 281 U.S. 673, 50 S. Ct. 451, "On petition for rehearing in State Supreme Court, plaintiff asserted that in applying a new construction

of a State statute, and in refusing relief because of newly found powers of State Tax Commission, the court transgressed the due process clause of the Fourteenth Amendment," and this court reversed "the judgment of the Supreme Court of Missouri . . . because it "denied to the plaintiff 'due process of law' — using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." Dan Rogers v. Ala., 192 U.S. 226, 24 S. Ct. 257.

In view of the decisions of this court in the three cases cited next above, it would appear that Petitioner in this case was not bound to anticipate that the Court of Appeals of Georgia would fail to follow its prior and well established decisions that a judgement against a person (natural or artificial) in his or its assumed or trade name is valid and binding, and that such a person is a party to the judgment, and is not entitled to file a claim to property levied upon to satisfy the the judgment, as well as prior decisions of the Supreme Court of Georgia to the same effect, and that Petitioner could therefore invoke protection of the due process and equal protection of the law clause of the Fourteenth Amendment upon motion for rehearing as made upon its failure to follow its prior binding decisions and those of the Supreme Court of Georgia on said point. The Court of Appeals of Georgia in Becker v. Truitt, 39, Ga. App. 286, 146 S.E. 654, and the Supreme Court of Georgia in Becker v. Truitt, 170 Ga. 757, 154 S.E. 262, had held that where process had been served on "City Coal and Grading Co.", and default judgment was entered against it upon its failure.

to answer, Charles L. Truitt, sole owner and proprietor of City Coal & &Grading Co., was precluded from interposing a claim for the property levied upon on the ground that he was not the party against whom the judgment was rendered.

As stated in the Petition for Certiorari, the uniform decisions of the Court of Appeals and the Supreme Court of Georgia, including Becker vs. Truitt, 39 Ga. App. 286, 146 S.E. 654; Becker vs. Truitt, 170 Ga. 757, 154 S.E. 262; Executive Committee of the Baptist Convention of Ga. vs. Smith, 44 Ga. App. 184, 161 S.E. 143; Eslinger vs. Herndon, 158, Ga. 823, 124 S.E. 169; and Smith vs. Hartrampf, 105 Ga. App. 40, 123 S.E. 2nd 417, hold that a judgment rendered against a person (natural or artificial) in his or its assumed or trade name is not void but valid and binding, and that such a person is a party to the judgment and is not entitled to file a claim to the property levied upon to satisfy the judgment and execution based thereon. The facts in the two Becker cases are very similar to the facts in the present case.

Respondent argues that the case of Williams vs. State of Georgia, 349 U. S. 375, 75 S. Ct. 814, cited on behalf of Petitioner, is NOT a case in which the constitutional qeustion was raised on review "but one in which it was raised in the extraordinary motion for a new trial and was ruled on by the trial court." Mr. Justice Frankfurter's statement of the Williams case includes the following: "While this court's decision in the Avery case was thus rendered over two months after Williams' trial, it came a month before the amendment to his formal motion for new trial. Yet Williams' counsel did not rely upon the ground raised by the Avery decision until six months later in his extraordinary motion for new trial."

With due regard to the circumstances of the Williams case, it is nevertheless submittted that if it is not unreasonable to assert a constitutional ground on an extraordinary motion for a new trial, MADE AFTER AN AFFIRMANCE BY THE APPELLATE COURT of a judgment of the trial court, then it is not unreasonable to assert a constitutional ground upon petition for rehearing after an affirmance by the appellate court of the judgment of the trial court, the effect of affirmance by the appellate court of the judgment of the trial court being to deprive petitioner of due process of law and equal protection of the law guaranteed by both the State and Federal Constitutions.

In the case of Patterson vs. State of Ala., 294 U.S. 600, 55 S. Ct. 575, this court granted certiorari and reversed the Supreme Court of Alabama where the State contended the U. S. Supreme Court lacked jurisdiction because the State Court's judgment rested entirely on question of State appellate procedure, and held that it was required to examine record to determine whether judgment was based on adequate non-federal ground.

In the case of Norris vs. Ala., 294 U.S. 587, 55 S. Ct. 579, this court held that where a federal right is specially claimed in a State court, the U. S. Supreme Court must inquire whether right was denied, not merely in express terms, but also in substance and effect, and, if necessary, evidence must be examined.

In the case of Herndon vs. Lowry, Sheriff, 301 U.S. 242, 57 S. Ct. 732, this court reversed the Supreme Court of Georgia in 182 Ga. 582, 186 S.E. 429, where the federal constitutional question was raised in a habeas corpus proceeding after Herndon's conviction by a jury in Fulton Superior Court had been approved by said court, and af-

firmed by the Supreme Court of Georgia and this court.

The contention of respondent that the constitutional question in this case was abandoned before petitioner concluded her quest through the state courts is entirely incorrect. As pointed out on page 6 of the petition for certiorari, petitioner duly filed a petition with the Supreme Court of Georgia for a writ of certiorari to review, correct, and reverse the erroneous decision of the Court of Appeals upon the same grounds urged in plaintiff's motion for rehearing in the latter court (R.104). It was denied (R.105). Petitioner also filed in the Supreme Court of Georgia a motion for reconsideration of the denial of her petition for certiorari to the Court of Appeals, which was likewise denied, as per certificate of the clerk of the former. Petitioner urged at every step the federal constitutional ground raised in her petition for rehearing in the Court of Appeals of Georgia.

The statement of Respondent that the judgment complained of was approved by nine Court of Appeals Judges is incorrect. Petitioner duly made a motion to Hon. Jule W. Felton, Chief Judge of the Court of Appeals of Georgia for a rehearing of her case before the full court of nine judges of said court pursuant to Ga. Code Ann. Sec. 24-3501 (Pocket Parts). That code section declares its purpose is "to avoid and reconcile conflicts among the decisions of the three divisions and to secure more authoritative decisions" and provides for a decision by the full court of nine judges under certain conditions therein specified to prevent such conflicts. As pointed out in petitioner's motion for rehearing in the Court of Appeals and in her motion for a rehearing by the full court of nine judges, the decision of Panel 3 of the Court of Appeals in this case is in direct conflict with the decision of

Panel 2 in Becker vs. Truitt, 39 Ga. App. 286, that of Panel one in Smith vs. Hartramph in 105 Ga. App. 40, and that of said court in Executive Committee of the Baptist Convention of Ga. vs. Smith, 44 Ga. App. 184, 161 S.E. 143. Nevertheless said motion of petitioner for a rehearing by the full court of nine judges was denied.

As pointed out in the petition for certiorari, no question of fact is presented where the respondent makes a solemn admission in judicio in the main case that it is the defendant in fifa. as it did in this case or where the uncontradicted evidence shows the same. (R. 58, pages 10 and 11 of the petition for certiorari).

Respondent contends that petitioner in effect asserted that no substantial constitutional question was involved by stating that the Court of Appeals had jurisdiction as the case was not one in which the Supreme Court of Georgia had exclusive appellate jurisdiction, citing Ga. Code Ann. 2-3704. There is no merit in this contention of Respondent, because (1) Petitioner could not anticipate that the Court of Appeals would not follow its prior controlling decisions on the point involved and (2) the Supreme Court of Georgia in construing Ga. Code Ann. Sec. 2-3704 has uniformly held that the Court of Appeals, and not the Supreme Court of Georgia, has jurisdiction to decide questions of law involving application of plain and unambiguous provisions of the Constitution. Abbott et al v. State, 211 Ga. 200, 84 S.E. 2nd 667; Felkner v. Still, 176 Ga. 735, 169 S.E. 15; Baker v. State, 198 Ga. 290, 31 S.E. 2nd 398. 397,

Petitioner therefore again urges that she is entitled as a matter of constitutional right under Section I of the 14th Amendment to the grant of the writ of certiorari to the Court

of Appeals of Georgia and reversal of its arbitrary, capricious, and unconstitutional decision.

Respectfully submitted,
G. Seals Aiken,
Attorney for Petitioner
1409 Candler Bldg.,
Atlanta, Ga.

Charles W. Bergman,
of Counsel

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing reply brief of Petitioner for Certiorari.

This October....., 1962.

.....

Counsel for Jackson's Atlanta
Ready Mix Concrete Company, Inc.